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No. 73-881

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

OLLIE HERMAN LINCOLN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that proof that a firearm was transported in interstate commerce prior to the enactment of 18 U.S.C. App. 1202(a) is not sufficient to provide the interstate nexus required by the statute.

After a jury trial in the United States District Court for the District of Maryland, petitioner, a previously convicted felon, was convicted of possessing and receiving firearms, in violation of 18 U.S.C. App. 1202 (a)(1). He was sentenced to two years' imprisonment with 18 months of that sentence suspended, and was fined $3,000. The court of appeals affirmed *per curiam* (Pet. App. 1a - 2a).

The government's evidence at trial showed that petitioner had previously been convicted of a felony in the United States District Court for the District of

Columbia (Tr. 23-24).[1] On September 21, 1971, petitioner was observed with a lever-action rifle and a snub-nosed revolver (Tr. 79-80). On October 12, 1971, one Marlin lever-action rifle and two Smith and Wesson revolvers were seized from a bedroom in petitioner's home in Silver Spring, Maryland, pursuant to a search warrant (Tr. 112-121). Petitioner's fingerprints were on all three weapons (Tr. 149-150).

The Marlin rifle was manufactured in New Haven, Connecticut, and shipped from there on August 21, 1956 (Tr. 37-38). The two Smith and Wesson revolvers were manufactured in Springfield, Massachusetts (Tr. 57). The .32 caliber revolver had been shipped to Laurel, Maryland on May 12, 1971 (Tr. 64-67), and the .38 caliber revolver had been shipped to Roanoke, Virginia on March 20, 1970 (Tr. 69-70).

Petitioner, apparently urging a retrial as to the revolvers only, argues (Pet. 4-5) that the statute should be construed so as to require a showing that the interstate movement occurred subsequent to the date of enactment, June 19, 1968. That argument has been uniformly rejected by the courts of appeals. *United States* v. *Mancino,* 474 F. 2d 1240 (C.A. 8), certiorari denied, 412 U.S. 953; *United States* v. *Giannoni,* 472 F. 2d 136 (C.A. 9), certiorari denied, 411 U.S. 935.[2] It is the receipt or possession of the firearm which must have occurred after the date of enactment, not the interstate

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[1]"Tr." refers to the two volume transcript of the trial proceedings.

[2]See also *United States* v. *Gazzola,* 475 F. 2d 1393 (C.A. 2), certiorari denied October 9, 1973, No. 72-1587; *United*

movement. Cf. *United States* v. *Bass*, 404 U.S. 336, 350.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

States v. *Mullins*, 476 F. 2d 664 (C.A. 4), certiorari denied, October 9, 1973, No. 72-6700; *United States* v. *Brown*, 472 F.2d 1181 (C.A. 6); *United States* v. *Lupino*, 480 F.2d 720 (C.A. 8), certiorari denied, October 15, 1973, No. 73-5104.

[3]Petitioner also contends (Pet. 5-6) that the statute is unconstitutional in that it makes criminal an act not prohibited by state law. The Commerce Clause imposes no such restriction on the Congress.